INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — TAXATION — TAX ON TRANSPORTATION OF OIL IN PIPE LINES WITHIN STATE. — A West Virginia statute provides for a tax on all oil transported in pipe lines. (1919 W. VA. ACTS, EXTR. SESSION, c. 5.) The plaintiff's pipe line system consists of the West Virginia portion of a trunk line running from Ohio through West Virginia into Pennsylvania, through which there flows a constant stream of oil, and a network of feeders from West Virginia wells. For oil "gathered" the producer receives a "credit balance" slip. The company must at all times have in its pipes sufficient oil to meet its "credit balances." (1913 W. VA. CODE, § 3564.) The oil is piped to trunk line junction points. The producer pays, under a state tariff, a charge for "gathering" and transporting to the junctions, and a daily storage charge. On sale of the oil, the producer gives the company a "delivery order" if the sale is intrastate, a "tender of shipment" if interstate. The oil delivered is not that which the producer turned over to the company, but any oil of the same grade. The company holds the producers' oil at the junction points only until the trunk line is running oil of the same grade, when it is allowed to flow into the stream whether or not shipment orders have been received. "Delivery" and "shipment" orders are filled by diverting part of the stream. Of six million barrels gathered in West Virginia, one and one quarter millions were delivered in West Virginia, the remainder in Pennsylvania. The state seeks to tax the transportation to the junction points of all oil produced in West Virginia. *Held*, that the tax is unconstitutional as levied on the transportation of oil which ultimately left the state. *The Eureka Pipe Line Co.* v. *Hallanan, State Tax Commissioner*, U. S. Sup. Ct., Oct. Term, 1921, No. 255.

Whether commerce is interstate or intrastate is a practical question to be determined by the facts of the particular case. See *Chicago, M. & St. P. Ry.* v. *Iowa*, 233 U. S. 334, 343; *La. R. R. Comm.* v. *Tex. & Pac. Ry.*, 229 U. S. 336, 341. In the principal case the inquiry must be whether the transportation to the junction points and the transportation beyond were separable. No oil when shipped had a predestination to give the shipment character. It might be delayed at the junction; or it might flow continuously to some point on the trunk line, either within or without the state. In this state of facts the decision of the majority, that the character of the commerce is to be determined by the course which the oil in fact followed, is reasonable. But it is not unreasonable to hold with the minority that the transportation to the junctions was, as a practical matter, separable and intrastate. Neither decision is logically necessary; neither decision is necessary as a matter of practical judgment. The balance being so nearly even, a desire to adjust the power of the state to tax with the Federal power over interstate commerce so as not unduly to restrict either, might well have influenced the court, and led to a contrary result.

LANDLORD AND TENANT — ASSIGNMENT AND SUBLETTING — LIABILITY FOR FAILURE OF LESSOR'S TITLE DISCOVERED AFTER AGREEMENT TO ASSIGN. — The defendant corporation employed the plaintiff to sell certain of its leases. The plaintiff found a purchaser, to whom the defendant contracted to convey. The contract was cancelled because of a failure of title in the defendant's lessors. It was urged as one ground of defense that no covenants for title were implied in the contract to convey. *Held*, that judgment be entered for the defendant. *Miles* v. *United Oil Co.*, 234 S. W. 209 (Ky.).

If the contract with the prospective purchaser bound the defendant to make out a good title to him the plaintiff may recover his commission, as he has done the acts required, and the failure of the transaction is solely through the breach of contract of the defendant. *Tanenbaum* v. *Boehm*, 126 App. Div. 731, 111 N. Y. Supp. 185; *Wheelock* v. *Bornstein*, 214 Mass. 595, 101 N. E.

1086. After an executed conveyance of a fee without covenants, no action ordinarily lies against the vendor if it transpires that he had no title. *Earle* v. *De Witt*, 6 All. (Mass.) 520; *Thorkildsen* v. *Carpenter*, 120 Mich. 419, 79 N. W. 636. But if the agreement is still executory the purchaser cannot be forced to take the vendor's defective title. *Vought* v. *Williams*, 120 N. Y. 253, 24 N. E. 195; *Smith* v. *Hunter*, 241 Ill. 514, 89 N. E. 686. And he may bring an action against the vendor for damages for breach of contract. *Vaughn* v. *Butterfield*, 85 Ark. 289, 107 S. W. 993; *Fleckten* v. *Spicer*, 63 Minn. 454, 65 N. W. 926. In the case of a contract to sell a lease the assignee will be injured if either the assignor's or the lessor's title is defective. Accordingly it has been held that the prospective assignee need not accept an assignment if the lessor's title is bad. *Purvis* v. *Rayer*, 9 Price, 488; *Souter* v. *Drake*, 5 B. & Ad. 992. And it follows as before that a right to damages against the assignor should be allowed. The court in the principal case admits that the transaction here is only an executory agreement. But it then decides the case as if the sale were executed, with the result that the ground of its decision, that no covenants will be implied in an assignment, has no application to the facts.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — EFFECT OF RESTRICTION AGAINST ASSIGNMENT ON COMPULSORY LIQUIDATOR. — The liquidator in the compulsory winding up of a corporation sought a declaration that he might assign a lease which contained a covenant against assignment without the lessor's consent. From an order granting this relief, the lessor appealed. *Held*, that the appeal be allowed. *In re Farrow's Bank, Ltd.*, [1921] 2 Ch. 164 (C. A.).

Although such restrictions as the covenant in the principal case imposes are valid, a change of tenant is not regarded as a breach in several instances. If the change is by operation of law it is valid; as when the personal representative of a deceased succeeds to the term. *Charles* v. *Byrd*, 29 S. C. 544, 8 S. E. 1. See 1 WILLIAMS, EXECUTORS, 11 ed., 702. An execution sale, also, is held not to violate the covenant, as the transfer is by the sheriff, not by the lessee. *Doe* v. *Carter*, 8 T. R. 57; *Farnum* v. *Hefner*, 79 Cal. 575, 21 Pac. 955. And it is held that a trustee in bankruptcy may assign. *Gazlay* v. *Williams*, 210 U. S. 41. *Cf. Doe* v. *Clarke*, 8 East, 185; *In re Georgalas Bros.*, 245 Fed. 129 (N. D. Ohio). The reasons given are that, not being an assignee, the trustee is not bound by the covenant; or that such a transfer is necessary to protect the rights of the creditors. See *Doe* v. *Bevan*, 3 M. & S. 353, 360; *Gazlay* v. *Williams*, *supra*, at 47. These reasons seem inconclusive; and as the assignment by the trustee really violates the intent of the parties, the bankruptcy cases seem wrong. Their doctrine should certainly not be extended. Under the statute in the principal case the liquidator does not get title and the court distinguishes the bankruptcy cases on this ground. The distinction, though fine, is a justifiable means of avoiding an extension of the doctrine. Where the liquidator does get title, the bankruptcy cases are followed. *Liquidation of Citizens Savings & Trust Co.*, 171 Wis. 601, 177 N.W. 905.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — "RENEWAL" CONSTRUED TO MEAN EXTENSION. — The plaintiff leased to the defendant for five years, with an option to "renew" for two further periods of five years each at specified rents. Notice of the election to exercise the option was not expressly required. The defendant remained on the premises for nearly nine years without ever having given such notice, always paying the stipulated rent. The plaintiff then gave notice to vacate, and on the defendant's refusal to do so instituted forcible detainer proceedings. These proceedings were dismissed. *Held*, that the judgment be affirmed. *Klein* v. *Auto Delivery Co.*, 234 S. W. 213 (Ky.).